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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES LEROY KELLY, Defendant and Appellant.	F056819 (Super. Ct. No. 1238711) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Hurl William Johnson III, Judge.

Donn Ginoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Michael A. Canzoneri, Deputy Attorney General, for Plaintiff and Respondent.

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Appellant, James Leroy Kelly, was convicted by a jury of robbery. (Pen. Code, § 211.)[1] In a bifurcated proceeding, the trial court found true allegations that appellant suffered three prior serious felony convictions (§ 667, subd. (a)), four prior serious and/or violent felonies within the meaning of the three strikes law (§ 667, subd. (d)), and one prior prison term (§ 667.5, subd. (b)).[2] The court denied appellant's *Romero*[3] motion but, at sentencing, struck one section 667, subdivision (a) prior serious conviction and the 667.5, subdivision (b) prior prison term. The court imposed a total term of 35 years to life, consisting of a 25-year-to-life sentence on the current felony and two 5-year terms for the remaining section 667, subdivision (a) prior serious felony convictions.

On appeal, appellant contends the trial court erred in denying his *Romero* motion to strike his prior convictions. He also argues that his sentence violates the proscription against cruel and unusual punishment and, in the alternative, that counsel was ineffective in failing to address the issue at sentencing. We disagree and affirm.

FACTS

On the evening of December 20, 2007, Annette Reeb was leaving home for work. She went through the garage of her house to get to her car parked in the driveway. She was carrying a purse. Reeb felt something brush past her and someone then slammed her face-first against her car. Appellant tried to grab her purse, but Reeb pulled it back and was again slammed against the car. Appellant then grabbed Reeb's purse with both hands and quickly walked away. Reeb's loud screams for help were heard by her son, who came out of the house, ran after appellant, and caught him. The two struggled, but Reeb's son hit appellant and retrieved the purse. Appellant was arrested after neighbors called police.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The information originally alleged three prior prison terms, but two of them were dismissed on motion of the prosecution.

[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

Appellant testified in his own behalf that he was running, grabbed the purse, and continued running. According to appellant, he lived down the street and was going to the convenience store. He took the purse because he had no money and wanted to buy a beer for $1.50.

DISCUSSION

1. Did the trial court abuse its discretion when it denied appellant's request to dismiss his prior strike convictions?

Appellant alleges that the trial court abused its discretion when it denied his *Romero* motion to strike at least one of his strike priors. He argues that the court failed to take into consideration his history of severe mental illness, including evidence of such illness in very close proximity to the current offense. We disagree.

Prior to the sentencing hearing, appellant's counsel filed a motion to dismiss at least one of the strike priors. Counsel asked that the trial court consider the age of appellant's prior convictions, which occurred in 1988 and 1989, and his "lengthy mental health history." According to counsel, appellant was previously found incompetent to stand trial and sent to a state hospital. He was currently on medication but continued to "hear voices" and was diagnosed as bipolar. As stated in his motion, "[Appellant] is not asking the court to strike all of the 667(d) priors or all of the 667(a) priors. What [appellant] is requesting is that the Court sentence him to a determinate sentence."

At the hearing on the motion, the court stated that it had reviewed both appellant's motion and the People's opposition. After counsel for both parties declined to comment further, the court denied the motion, stating:

> "Well, I reviewed the *Romero* case law, and I looked at the factors to be considered under the *Romero*, *Williams*, and case law about striking prior conviction. [¶] This case here was a robbery. The nature of the offense was a violent crime. [¶] I looked at his prior criminal history, and unfortunately for [appellant], he has not been free of any type of public offense where he has been either incarcerated in jail or prison for any considerable period of time. [¶] In fact, I believe he was on parole at the time this offense occurred. He has convictions going back to 1988 for different type matters. He has other prior seriously violent felonies that were found by the Court. He has a prior robbery or attempted robbery

> conviction. [¶] Unfortunately for him, his track record does not support any exercise of … discretion to strike any of the alleged prior convictions. [¶] I find no reason to strike these priors. There would be no reason to do so. Unfortunately, he has earned these strikes, and I'm not going to strike them. [¶] The *Romero* motion is denied."

Following denial of the motion, when asked if there was anything he wished to add, defense counsel responded:

> "[T]here's no question my client has some mental health issues. And over the years, he has had a variety of problems decompensating, not taking his meds, prior 1368s, and so forth. [¶] I would ask the Court, based upon the denial of the *Romero* motion, he is looking at 25-to-life, plus a number of enhancements, (a) priors as well as (b) priors. [¶] I would ask that the Court in the interest of justice strike all of those priors and limit his sentence to 25-to-life."

The trial court then struck the "third" section 667, subdivision (a) prior and the one-year section 667.5, subdivision (b) prior "in the [section] 1385 [motion] based upon his history of some mental problems," and imposed a term of 25 years to life, with two additional five-year section 667, subdivision (a) enhancements.

Appellant attacks the trial court's ruling on the *Romero* motion, claiming the trial court abused its discretion by failing to take appellant's mental illness into account. We find appellant's claim to be without merit.

In *Romero, supra*, 13 Cal.4th 497, the Supreme Court held that under section 1385, subdivision (a), a trial court may, on its own motion and in furtherance of justice, dismiss an allegation that a defendant has previously been convicted of a serious or violent felony. As the Supreme Court stated in *People v. Williams* (1998) 17 Cal.4th 148, in deciding whether to strike a prior conviction:

> "[T]he court in question must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id.* at p. 161.)

The Supreme Court further noted the trial court's decision is "subject to review for abuse of discretion. This standard is deferential. [Citations.] But it is not empty. Although variously phrased in various decisions [citations], it asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v .Williams, supra,* 17 Cal.4th at p. 162.)

Here there was no abuse. As the record demonstrates, the trial court was well aware of appellant's mental health issues. In appellant's *Romero* motion, defense counsel referred at length to appellant's mental condition and noted his tendency to "hear voices." The motion also stated that appellant had previously been found incompetent to stand trial under section 1368 and that he was sent to a state hospital.

According to the probation report, appellant's criminal history states that he suffered a misdemeanor conviction for being under the influence of a controlled substance in 1988 resulting in both probation and jail time. Appellant's strike convictions occurred in 1988 and 1989. In 1988, he was convicted of first degree burglary and received probation and jail time. In 1989, appellant was convicted of two counts of felony robbery, with a firearm enhancement, and one count of attempted robbery. He was sentenced to prison for 13 years 8 months. In 1996, appellant was convicted of petty theft with a prior and sentenced to prison for seven years. In 2005, appellant was convicted of felony obstructing an officer in the performance of his duties and sentenced to four years in state prison. In addition to suffering the above convictions, appellant violated his parole in 2002, 2003, and 2008. Appellant was on parole when he committed the current offense. The report also stated that, while appellant was at the medical center being treated for injuries after the current offense, he tried to kick a doctor in the head. Appellant was placed in a "wrap" to subdue him, but he told officers at the medical center that he was going to assault the correctional officers by stabbing them in the neck.

In addition, the trial court earlier presided over a competency hearing for appellant and, as such, had before it the psychological report filed in response to appellant's

competency motion. In the report, dated January 24, 2008, a little more than a month before the information was filed in the current offense, the psychologist, Philip S. Trompetter, stated that appellant's history indicated "periods of malingered mental illness and actual mental illness." Dr. Trompetter had earlier evaluated appellant, once in 1996 when he concluded appellant was malingering, and again in May of 2004 when Dr. Trompetter found no signs or symptoms of a mental disorder. When Dr. Trompetter evaluated appellant in July of 2004, he concluded that appellant "may be suffering from a Bipolar I Disorder." According to appellant's record, "some time after 1996" appellant received psychiatric outpatient care while at the Department of Corrections, and in early January of 2008, before the evaluation with Dr. Trompetter, had "much improved." According to Dr. Trompetter, appellant displayed evidence of "a major mental disorder" in early January of 2008 and was receiving psychotropic medications. As a result of the medication, Dr. Trompetter concluded that appellant had stabilized and was capable of understanding the nature and objective of the proceedings against him.

Given appellant's criminal history, his inability to avoid criminal activity for a substantial period of time, and his violent behavior, the trial court was well within its discretion to find that appellant fell within the spirit of the three strikes law despite his mental health history. Thus, we conclude the trial court did not abuse its discretion in declining to strike some or all of appellant's prior convictions.

2. Was the sentence cruel and unusual?

Appellant also contends his 35-year-to-life sentence constitutes cruel and unusual punishment in that his prior and current offenses were related to his serious mental illness and he had not had a conviction for a violent offense since his 1989 armed robbery convictions. We disagree.

"Under the three strikes law, defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 823-824, citing *Rummel v. Estelle* (1980)

445 U.S. 263, 284.) "California statutes imposing more severe punishment on habitual criminals have long withstood constitutional challenge." (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136-1137; accord, *Cooper*, *supra*, at pp. 820, 825-828 [25 years to life for a third strike offender convicted of being a felon in possession of a firearm was not disproportionate].)

"[I]n California a punishment may violate [California Constitution, article I, section 17] if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*).) To determine whether a sentence is cruel and unusual, we (1) examine the nature of the offense and the offender, (2) compare the sentence with punishments for more serious offenses in the same jurisdiction, and (3) compare the sentence with punishments for the same offense in other jurisdictions. (*Id.* at pp. 425-427.)

> "In examining 'the nature of the offense and the offender,' we must consider not only the offense as defined by the Legislature but also 'the facts of the crime in question' (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts); we must also consider the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind." (*People v. Crooks* (1997) 55 Cal.App.4th 797, 806.)

Here, appellant, 41 years old at the time of the current offense, had committed offenses since he was 21. We need not again recount his criminal history. Suffice it to say that he has committed a number of offenses, including serious and violent ones. Over the course of 20 years, he has been sentenced to over 24 years in prison, yet he continues to commit crimes. Appellant's prior offenses of armed robbery and attempted armed robbery are violent offenses. So is his current offense of robbery, which, by his own admission, he committed because he needed a few dollars to buy beer at a convenience store.

Appellant argues on appeal that his culpability must be addressed in relation to his mental illness. But Dr. Trompetter stated that, while appellant's history indicated periods

of mental illness, it also indicated periods of malingered mental illness. Dr. Trompetter also noted that appellant received care for his mental illness while in prison and that his mental illness was stabilized as the result of medication. Whether or not his conduct was attributable to mental illness, appellant was not sentenced as he was here because he was mentally ill. He was sentenced to the current term because of his continuing unwillingness, as opposed to inability, to conform his conduct to the law and his unwillingness to confront the reasons why he has failed to do so.

We find nothing noteworthy about appellant's offenses that would lead to the conclusion that his sentence is grossly disproportionate to the crimes; the sentence does not shock the conscience or offend notions of human dignity. (*Lynch, supra,* 8 Cal.3d at p. 424.)

Appellant makes little claim or assertion with respect to the second and third areas of focus under *Lynch*, that is, he does not compare his sentence with punishments for more serious offenses committed in California (*Lynch, supra,* 8 Cal.3d at p. 426), nor does he compare his sentence with punishments for the same offenses in other jurisdictions (*id.* at p. 427).

Appellant's sentence does not shock the conscience nor is it disproportionate under California law. With respect to his claim based on federal law, we can say the same. "The Eighth Amendment [to the United States Constitution], which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 (*Harmelin*).) "[T]he 'precise contours' of the proportionality principle 'are unclear'" and the principle is "applicable only in the 'exceedingly rare' and 'extreme' case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 72-73.)

Ewing's application of the Eighth Amendment followed the proportionality principles identified in the concurring opinion of Justice Kennedy in *Harmelin*:

> "'[T]he primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors'—that 'inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*Ewing*, *supra*, 538 U.S. at p. 23, quoting *Harmelin*, *supra*, 501 U.S. at p. 1001 (conc. opn. of Kennedy, J.).)

Here, appellant's sentence is not grossly disproportionate to the crime and enhancements for which he is being punished. Thus, his Eighth Amendment claim fails.

Because we address this issue on the merits, we need not further address appellant's alternate claim that counsel was ineffective for failing to raise the issue below.

DISPOSITION

The judgment is affirmed.

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DAWSON, Acting P.J.

WE CONCUR:

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HILL, J.

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KANE, J.